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Legal Problems in Data Management: IT & Privacy at the Forefront: Drafting and Implementing Effective Social Media Policies in the Workplace, 31 J. Marshall J. Info. Tech. & Privacy L. 549 (2015)

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SESSION TWO:

**DRAFTING AND IMPLEMENTING
EFFECTIVE SOCIAL MEDIA POLICIES
IN THE WORKPLACE**

MODERATOR:

DAVID SORKIN
PROFESSOR, THE JOHN MARSHALL LAW SCHOOL

PANELIST:

CHARLES LEE MUDD, JR.
PRINCIPAL ATTORNEY, MUDD LAW OFFICES

PROFESSOR SORKIN: As the symposium continues, it's my pleasure to introduce next speaker, Charles Mudd of Mudd Law Offices, who will speak about drafting and implementing effective social media policies in the workplace.

(Applause.)

MR. CHARLES MUDD: Thank you. I want to thank everybody for coming and The John Marshall Law School for having me. I am going to talk about drafting social media policies in the workplace. One of the first things that we need to discuss before we get into the details of drafting social media policies is, what is social media. You know, in our typical parlance, you might think of social media as predominant medium such as Facebook, Twitter, and LinkedIn for professionals, but social media goes well beyond that. In our firm, with our prior social media coordinator who does some work for our clients in terms of social media, we use social media as a means to also combat negative content online for our clients, we have come up with a list of more than 40 different social media vehicles or mediums or networks, if you want to call them that. And for all of those, a company could have a profile or individuals could have a profile. Some of them probably a company would not necessarily want to be associated with. There are some particular venues out there or social media platforms that would not necessarily work for a company. Some individuals dating might be more interested in some social media platforms, but it's important, I think, as an attorney representing employers and companies, and drafting social media policies, that our clients know the full extent of what social media is; if you don't, then they can't really regulate them in the workplace.

So the first question is what is social media? It's all of those platforms, and it constantly changes. I mean, now we have Snapchat where you can send out a photograph and it disappears. Periscope, just came out within the last week, and it's kind of live video blogging. You really need to keep up-to-date on that. In addition, beyond just social media platforms that are publicly accessible, such as Twitter, Facebook, LinkedIn, About Me, and so forth, there are also internal social media platforms. So, for example, Yammer. You might actually have an internal workplace social media platform where employees can communicate with one another freely on a social media platform, but it's private within the company.

If you have a firm like mine where there's five or six, maybe eight people working, that's not that difficult and it's not necessarily that significant. But if you have an employer with a workforce of 50, a hundred, a thousand people, that social media platform can have a lot of content and a lot of use.

So that is what we're talking about when we discuss social media,

at least in this context. And, as I say, it's very important to have that understanding before we get into talking about the initial considerations in drafting social media policies. And one of the questions that must be asked by the employer is what are you trying to accomplish? What is the employer trying to accomplish by a social media policy? And it varies.

I had a client, still have a client, but their perspective in immediately modifying their social media policy or their workplace policy, was to restrict employees from giving each other recommendations on LinkedIn. What they were finding is that colleagues were giving their peers endorsement as though the endorsement was coming from the employer. And from my client's perspective in talking to me, they're peers. They're not in a supervisory capacity, to begin with. So they certainly have no ability to speak on behalf of the company in terms of how their peer is doing as an employee. They just don't know. It's the supervisor that would have that context, and two they don't have the authorization of the company. They shouldn't be out there speaking on behalf of the company.

So on LinkedIn where you have these endorsements, it may be one thing for John to say, you know, Paul is a great guy to work with, we had lots of fun and we went out to the bar every night. It's another for John to say that Paul was a great employee, he worked hard, he did a great job for the company, you know, we miss him dearly.

So my client's perspective in that situation was to prohibit employees from endorsing one another on social media platforms or any platform.

On the other end, there might be some IP concerns that we'll get to in a bit. There might be that you want employees to be out there using your trademark on social media, but you want to restrict what they're able to say or you want to try to restrict what they're able to say and what they're not. So beyond having an understanding of what social media is, the client, the employer, and the attorney advising those needs to know what are you trying to accomplish? What is the purpose of having a social media policy? And as an aside, I would recommend that or say that any employer from an employer of two to an employer of 100,000 should have a social media policy, particularly in this era where so many people use social media in their daily lives. And it's so easy to pick up the iPhone and post any number of sites, particularly if you're using Buffer that just logs them all on one app and you can just choose how many social media platforms you want to post to. And within ten seconds you can post something to 15 different sites.

The next consideration is whether your existing documents, the existing employer documents already address social media policy or what you're trying to accomplish with the social media policy. For example, you may have a nondisclosure agreement that restricts an employee's

ability to disclose confidential or proprietary information.

And as I'll get to this in a little bit, in all of these restrictions, I want to have the biggest caveat out there right now for employers and social media policies and restricting speech. And, that is, the National Labor Relations Act. Any of these policies have to be very careful that you do not restrict employees' ability to talk about how bad a workplace the employer actually has. They can talk about that and to the extent that the employees or the employers try to restrict employees talking about working conditions or unionizing or talking about changing the working conditions, the employer is going to get into trouble.

So there are a lot of NLRB decisions out there where the words "confidential information" have not been further defined beyond just the word "confidential," and that's not enough.

So turning back to the nondisclosure agreement, we might be talking about propriety trade secret information that an employee can't disclose. And that's what we probably want to prohibit our employees from disclosing with our social media policies.

So the question is, do the existing documents meet the goals? The nondisclosure agreement, non-compete agreement you might already have an employee manual or an employer policy manual. You might have just an employer contract. Do any of those documents already address what you're trying to accomplish?

And the reason that I would suggest implementing a social media policy is not to be taken lightly. It's a political and legal endeavor. And the political context is not pissing off your employees or your clients' employees, because if it's implemented the wrong way, the employees can view that as "you're telling me what I can say when I leave your workplace? You're telling me what I can or can't say online after I leave the door and go home?" And you don't want that.

So if you already have some documents that the employee signed that are addressing what you're trying to accomplish, don't disclose our trade secrets, then maybe you don't need to implement a social media policy, or maybe you modify the nondisclosure agreement so that it's not as significant in implementation.

Privacy considerations. Going to what I believe an employee might find objectionable in trying to control what they say outside of the workplace, you need to have an idea of the privacy considerations of the clients in place. So when I'm talking about the employer, for those that are attorneys or law students, I'm talking about your potential clients. Or if you're in-house, the employer that you work for, and then for those that perhaps own businesses, I'm talking to you specifically.

You have to have an understanding of the privacy considerations before you draft and implement a policy. Are you actually trying to restrict what an employee does off-site? Are you going to be monitoring what they communicate? Are you actually going to be auditing their so-

cial media accounts, their personal social media accounts to see what they say? If you are, it's better to be up front about that right away and say, you know, as I do in my employee policy talking about e-mail -- though I don't have the time to monitor my employees' e-mail -- but my employee manual says that it's a possibility that we could review e-mail and website activity.

Just as an aside, I had an employee once that had started, first day, and I was involved in a client matter, wasn't really able to do what I needed to do to set her up on the computer, but I had given her some things to read, to research, and I told her that I would install the software that she needed, let's say it was Acrobat Professional. I don't know what it was. I will do that later that night. So employee leaves, and I get on to the computer, and I go to start to install the software and I see things popping up on the bottom, they're chat messages. I'm like, that's really interesting. They're not talking to me. So then I pull up the browser, and there were, like, 25 sites. She was logging into her law school's communications platform or whatever where the messages were coming from. I clicked the arrow and there were 15 different pages or documents going back and forth. So there was basically about four hours' worth of non-work-related activity on her first day of employment. That was just a really bad decision on her part. And it's not that I went looking for that. I certainly didn't expect that. I was busy doing other things, but it just so happened in the context of installing software that I came across it. And so you would not want to get into a situation where, let's say, that there was some disciplinary action taken in that context or just letting somebody go, you don't want to be viewed as having violated her privacy by checking the Web browser on an employer-based computer to see what personal communications or conduct occurred.

And so that's why my policy says, look, I may not -- it doesn't say I don't have the time, but it says that at any time I have the right and the ability to inspect the use of my computers and the software on there. And that's a message to them; just leave your personal stuff at home. But returning to social media policies, if you're actually going to potentially monitor, and you may not think that it's important, or your clients may not think it's important, but if you're actually intending to monitor what an employee does off-site on their Twitter account or their Facebook account, it's a dangerous place to go. And if you're going to do that, you should let the employees know up front that you're going to do that. And the reason that I say it's a dangerous place to go, is that you might learn some things that may not be the basis for disciplinary action or human resources action, or what have you, it may not be the basis of that, but if you learn certain information and then some action is taken, it's oftentimes hard to argue after the fact that that wasn't a consideration that came into play.

So, for example, if you learn about somebody's lifestyle or things that they're doing or places that they're going through their social media endeavors and you later take disciplinary action, you know, that could come back, if they're challenging what you do. So it's better to be up front on the privacy considerations.

And so with all of this, when we're advising employers on whether to draft -- or in drafting social media policies, after you talk to them about what social media is; you talk about what they're trying to accomplish; the existing documents that they already have and the privacy considerations. The first question after all that is, should we draft a social media policy? Do you really need a social media policy?

Let's assume that they say yes, and then we go on to -- so this is where I was saying, what are you trying to accomplish? Do existing agreements meet your goals and privacy considerations? So let's assume that we decide yes, we are going to draft a policy or our client does want to draft a policy after we have explained that background. The first is, returning to one of the questions that I mentioned before, do we include the social media policy as, let's say, part of the employee manual, do we add it into a section of an existing agreement, is it a subset of the non-disclosure agreement?

My recommendation in general terms is that if you're going to go the step of adopting a social media policy, you want to have it a separate policy. You may also have it as part of the employee manual, but you do not want it hidden in a nondisclosure agreement or something that somebody might argue, well, I never read that, I never saw that. And there are other reasons as well, in terms of the implementation of the social media policy that I'll get to, that speak to that, as well. It should be a separate document or it should be a document that they are going to read, in and of itself, so that it's very clear.

And then the philosophy. This ties again -- this is even before we get to the legal considerations. This is, as attorneys, advising employers. It ties into the question, what are you trying to accomplish? What are we trying to get from the social media policy? Philosophy is very important.

Are you going to come on strong and is the purpose that you had some rogue employees going out and disclosing things, trade secrets, proprietary information and you need to nip that in the bud right away? Or is it more a recognition that technology is changing, we need to protect our assets, but we need to do it in a positive, embracing manner? And that's going to come across in drafting the policies, as attorneys drafting the policies or advising clients and the language they use. It's like any -- it's like a demand letter in litigation, almost, right?

I mean, you can come on very strong or you can come on and say, look, you know, you've engaged in some conduct that our client finds objectionable. Here is an opportunity to resolve it. You meet these specific

demands. We can make it all go away. So the philosophy and the language taken is very important. I would recommend most of the time that it should be an embracing, collegial philosophy and that it should exude through the social media policy. It should not be big brother coming down enforcing what somebody can or can't say or do or can't do. And let's take another step back for a moment.

When we are talking about social media policies, there are multiple, or at least two or three aspects of regulating social media in the workplace. It's regulating the social media accounts of your general employees, what they do or don't do on social media. Then it's also regulating those employees that are given access to employer or company social media accounts, what they can say or what they can't say. Thirdly, it's also giving guidance to those, if you are auditing social media conduct or communications, giving guidance to those actually doing the auditing.

So when we're talking social media policies right now, those are three aspects that need to be considered, regulating just how your average employee uses social media. For those that are given access to company- or firm- or employer-related accounts, what they can or can't do with those accounts, and then, finally, for those that are doing auditing, what they are supposed to be looking for and how they do that.

So moving from philosophy, having a general perspective and what we're trying to accomplish, having that come across, because you're going to want -- I mean, a social media policy basically is restricting the speech on, or giving guidelines for speech of your employees. So it is not an easy thing to implement or get employees to accept readily in most cases.

So, again, the philosophy is very important and shouldn't be understated. Then when we get to specific goals, some of them that I mentioned before, branding control, what are people saying out there, what your employees are saying out there about the company.

Again with the caveat throughout that you have to be very careful of Section 7 of the National Labor Relations Act and there are certain things that you can't restrict. Even though your employer or clients might want to restrict it, they can't, and they need to get -- you know, they need to be very specific that they're not regulating that. Your client would probably say, "Well, I don't want to put that in black and white, right? I don't want to say you can go out there and talk about the working conditions. I'm not regulating that. That's just inviting them to do so."

My response would be: Well, National Labor Relations, NLRB decisions clearly state that if your policy is ambiguous or if an employee could read it and not readily know what they can or can't say, it's possible that that whole policy could be thrown out and not be enforceable and it not have -- and there are decisions as well from the NLRB that

have thrown out the savings clauses. So as many of you know, the draft contracts you have or even a settlement agreement, you have a term in there that if the court finds any of these terms to be unreasonable, then the remaining terms survive, and for those deemed unreasonable, the court has the power to tailor them to what would be enforceable. There are some decisions that completely throw out social media policies, despite having savings clauses because of the ambiguity. So again, though the client may not like it, it is better to be in black and white and say these are things that we're not trying to restrict. You don't have to necessarily say, go out and talk about our working conditions, but you should say these are things that we're not restricting.

We're getting to branding control, putting aside talking about workplace conditions, you may not want or your clients may not want their employees talking about political candidates and having your company logo or their employer's, your client's logo alongside their political views, whatever they may be. It might be that some people have some very strong opinions about things that are going on in the world, and you don't want the company necessarily to be associated with those opinions, not because you feel one way or the other. It may just simply be that you don't want to take a position one way or the other. So that goes into the branding control as well, controlling the marks, the company names, the employer's names and what it's being associated with. And from my perspective, an employer certainly has the right to say that it doesn't want employees out there making statements and making it appear that their employer is endorsing those statements.

Corporate message related to that endorsement, same thing, and then the trade secrets and intellectual property. So, again, this ties back to specific goals, and the language of the policies, the social media policies need to be addressed in each of the things that we need to accomplish.

Getting to some specific legal parameters, the first is, as I mentioned throughout, the National Labor Relations Act. It may be that your employer doesn't have -- your employer client does not have a union-based employee population. Yet, depending on circumstances, the absence of a union doesn't mean that a union couldn't later occur.

But whether it's union, the client has union-related employees or not, in drafting social media policies, I think we need to advise our clients to take the NLRB decision seriously and have them guide the development of any social media policies.

Employee versus non-employee. What I mean by this, there are two aspects by this. One is, regulating your employees. There are legally employees and then also independent contractors. At the same time regulating the speech that an employee engages in, in relation to their employment and employer, and then non-employees' speech, things that the employee states outside of the workplace on their own time in their

own social media accounts.

And again, I can't emphasize how important it is to have social media policies if you're an employer -- it's kind of like some websites having a privacy policy. So the question arises, do/does our website have a privacy policy or not? I would say right now, that, you know, almost if you don't have a privacy policy, it is more of a business decision than a legal one, but at the same time, you can't just pop up a privacy policy that you find from some other website. And I have clients come to me after getting into trouble, "I just went and installed this privacy policy that looked really good. You know, it was designed well. The formatting was good. I copied it and changed the name and put it on my website," and they had no idea what it was actually saying.

And so you get into more trouble than if you didn't have a privacy policy than if you put one up and doesn't actually comply with the terms. The same with a social media policy. You can't just go out there and find something and pop it up. You have to know what the terms say.

Ownership is a really interesting issue, and there is a decision, *Eagle v. Morgan*,¹ where the ownership of the social media accounts came into play. Essentially, there is a LinkedIn profile at issue. An employee created a LinkedIn -- her LinkedIn profile, and she later left the company and the company tried to assert ownership over her LinkedIn profile, they said that while working there, all the connections that she had developed, you know, were just because of the employer and employee -- related to her employment, and consequently was an asset of the company. The court, federal court decided ultimately that, that was not the case, that the company did not own her LinkedIn profile.

But it's very important, ownership -- so when I talk about ownership, I don't think that employers try to assert ownership over personalty-related profiles. What I mean by that is, if somebody has their personal LinkedIn profile or personal Twitter account, you know, the employer should not try to assert ownership over that and should make it very clear, perhaps, that it's not doing so. But what the employer does want to do is assert ownership over its accounts, the accounts that it has created to market the company. So that if you have a LinkedIn company page or you have a Twitter account or multiple Twitter accounts for the client employer, the ownership of that needs to be made very clear. It needs to be made very clear, for example, that even if you are posting things to those accounts using your own devices that the ownership of the social media accounts stays with the employer. It's really a scary situation for the employer, because, depending on how many employees you have and how far down this social media marketing is taking place, the CEO probably does not know what the pass-

1. *Eagle v. Morgan*, No. 11-4303, (E.D.P.A. Oct. 4, 2012).

words are to those accounts.

So you have to have somebody trusting within the organization that has all of that access. And another item that's recommended in social media policies is that the employees, without authorization, cannot change any of the passwords or log-in credentials for the employer-related social media accounts.

Again, thinking about privacy, privacy is very key. Some other aspects that aren't up there that I want to talk about, returning -- you remember that I mentioned that social media platforms can both be internal and external. So within the workplace, employer may want to make sure that the policies are designed to avoid bullying or harassment or the use of social media to affect the performance of other employees. And that is a worthy goal of having a social media policy and making it very clear, that social media should not be used to create a harassing environment.

Or let's say that you have -- that the employees are not allowed to talk about other employees' personnel issues and so forth through social media. You would think that many of these issues become self-explanatory, but then you read in the news the examples of where that hasn't occurred.

I could talk all day on various aspects of this, but I do want to move on to implementation because it's very important to consider that when we're advising our clients. Our job doesn't end when we draft a social media policy. The drafting of a social media policy does not end with just the words on the paper and passing it off to the employer and saying good luck. Rather, we need to also advise or at least caution our employer clients about how to implement the policies. Let's say -- it goes to revising employee contracts. You know, you can't necessarily just revise an employee contract without additional consideration for an existing employee.

So let's say you hire somebody, they sign an employee contract and later you change some terms and you want them to sign a new contract. You can't just say, well, your continued employment is sufficient consideration. That really doesn't work. So if you have this -- I oftentimes advise my clients, if let's say at the end of year, December, you're looking at giving out year-end bonuses and you're also wanting to implement some changes in non-disclosure agreements, non-compete agreements, that's a good time to tie in the new agreement, signing off on them with the year-end bonus, so that there is some additional consideration.

There's a whole lot of that that we really can't get into here today, but there is some cases out there saying that an employer -- an employee needs to be there, perhaps five years at a company or three years to restrict certain aspects of the employment in the employee agreements. But the timing is very important, so if you already have employees and

you're adopting a policy or you're changing something, a dynamic that already existed in the workplace, or we're advising our clients on this, the timing is important. So enforceability of the policy might be an issue that you want to consider, hence, the timing.

Another reason timing is important is that you just don't want to throw a policy out there and say, it's effective Monday. If I sent around a policy today to my employees and said effective immediately or effective Monday, this new social media policy is in effect, that's not going to work. It's not recommended. You need time to implement it, time to have the employees, understand what the purpose of the social media policy is and that's where workshops come in. I think in advising my clients and adopting a social media policy, the employer is going to have legitimate reasons for doing that. Oftentimes those legitimate reasons can be tied in to the benefit of the employee: "Look, employees, if we have individuals within our organization going out talking about our trade secrets, your job is at stake, because if our competitors get our trade secrets, if our employees can go out and talk about the next great product that we're developing in isolation, we may not have a viable company. And so at the same time that we're protecting the company's interest, we're protecting your interest."

It's kind of like telling my associates, we can't disclose client information. If we get sued, that's affecting not only me and the company, but it's also affecting your job, right? It should be self-evident, but oftentimes it's important to recognize that the implementation of policies in an employer context, even a law firm context, making sure that they read the ethics rules, making sure that we talk about ethics and so forth, is due diligence so that we protect the firm, but we also protect the individual jobs. Therefore, If you have workshops where you're explaining that and the rationale behind implementing the policy and you get the employees or our clients get their employees to understand why we're doing this, I think it's going to go a long way toward having them not only accept it in a non-begrudgingly way, but also you'll encourage self-monitoring, you'll encourage them to comply and help the company essentially self-enforce the policies.

Audit and enforcement is basically what are you going to do. I mean, you have this policy. As with anything, you know, from raising children, employees, whatever the case may be, if you have rules and you don't enforce them, your employees or our clients' employees learn that they're really not going to -- they're not going to enforce that.

Then you get into situations where the company may, or your clients may, have policies that they don't enforce, and it creates a status quo where they're really not enforced. They're out there, but nobody is doing anything about it. Then lo and behold, one of the employees does something and your client tries to enforce it, and fires them. They sue the company and say, no. What you may have had in writing was not

the workplace environment, everybody was doing it. You can't fire me. There are decisions out there that agree with the employee. Just because you have something in writing does not trump what the actual practice may happen to be.

So if you are going to have a social media policy, again turning back to what are you trying to accomplish. How seriously are you going to take that, and are you going to enforce it? If you're going to have a policy, you need to enforce it. But in enforcing it, when our clients enforce it, it really should be in proportionality to the violation. We don't need to fire somebody necessarily for saying it's a great time working at Mudd Law Offices, and my policy may have said, don't talk about Mudd Law Offices and having a great time. I wouldn't want to fire somebody for that. I may say, "You know, I really appreciate the comments that you gave, and I really do like that, but that violates our social media policy and I can't have you doing that."

Case in point what really got a client into trouble was in a particular industry there was a website where they were marketing, and a bad review came on. In fact, a false review came on to the website, a really bad false review that was making them look bad. Their revenue dropped the number of contacts that they were getting dropped. They actually lost business that already contracted with them, and some of the employees that were working for my client went on and posted great things about the company. "This is a great place. They do a great job. They care."

What happened is the particular website ended up penalizing my client, because they saw the IP address and tracked it as being self-promotion, which is prohibited by the terms of use of that particular website. So to a certain extent, while my example of Mudd Law Offices is a great place to work was somewhat spur of the moment, as an example, it did have a real-world counterpart where some employees went on and actually harmed the company more than the negative review, because the company's officer had been working with the website to address the issue of the false statement, and then the company with the website saw that they were self-promoting and just dinged them more and basically said, we will decide when the penalty is lifted. So now we're in a bad situation.

You need -- if you update the policy, you need to keep the employees updated. You should let them know how things are going.

And with that, I think I'm right about at the end of the time. Does anybody have any particular questions?

You can't use early morning as an excuse. It's 11:30 now.

(Laughter.)

Well, with that, I thank you very much and have a great day.

(Applause.)

